



May 1, 2017

***EX PARTE VIA ECFS***

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: *Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278.***

Dear Ms. Dortch:

On April 27, 2017, the undersigned, and Michael McMenamin of Winning Strategies Washington; Vincent Frakes and Aaron Maguregui of WellCare Health Plans, Inc; Dana Thomas and Samuel Marchio of Anthem, Inc; Paul Miller of the American Association of Healthcare Administrative Management (“AAHAM”); and Mark Brennan and Arpan Sura of Hogan Lovells US LLP, counsel to AAHAM, met with Zenji Nakazawa, Acting Public Safety and Consumer Protection Advisor to Federal Communications Commission (“FCC” or “Commission”) Chairman Ajit Pai.<sup>1</sup>

During the meeting, we urged the Commission, through the Consumer & Governmental Affairs Bureau, to grant the pending Joint Petition expeditiously.<sup>2</sup> The Joint Petition seeks two clarifications regarding healthcare-related communications under the Telephone Consumer Protection Act (“TCPA”) and the FCC’s *2015 Omnibus TCPA Order*<sup>3</sup>:

1. That the provision of a phone number to a “covered entity” or “business associate” (as those terms are defined under Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)) during a HIPPA-governed transaction, for the purposes of treatment,

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<sup>1</sup> Mr. Maguregui attended via teleconference.

<sup>2</sup> Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278 (filed July 28, 2016) (“Joint Petition”).

<sup>3</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“*2015 Omnibus TCPA Order*”).



payment, or health care operations, constitutes prior express consent for non-telemarketing calls allowed under HIPAA to that number.

2. That the prior express consent clarification in paragraph 141 and the non-telemarketing health care message exemption granted in paragraph 147, both in the *2015 Omnibus TCPA Order*, be clarified to include HIPAA “covered entities” and “business associates.”

We explained that the clarifications are necessary because the *2015 Omnibus TCPA Order* may have unintentionally created the impression that its healthcare sections apply only to telephone numbers provided to HIPAA-regulated “healthcare providers.” In so doing, the Commission created uncertainty about whether other “covered entities” and “business associates,” which are already subject to HIPAA’s comprehensive privacy and data security protections and would be sending or placing the same communications, benefit from the decision. There is no valid reason for the Commission to restrict *which* HIPAA covered entity or business associate must receive the telephone number from the consumer when the actual calls made by a HIPAA covered entity or business associate will be identical (such restrictions also present First Amendment concerns).

We also explained that the *2015 Omnibus TCPA Order* separately may have unduly restricted certain non-marketing calls that are allowed under HIPAA and are critical to a functioning efficient and effective health care ecosystem, such as calls related to health insurance or payment of health care.

The FCC and the Federal Trade Commission (“FTC”) have consistently emphasized the importance of harmonizing the TCPA or other calling requirements with HIPAA.<sup>4</sup> They have also recognized that HIPAA includes robust privacy regulations that protect communications within the healthcare ecosystem. In addition, the FCC has previously recognized that, where non-marketing communications are governed by HIPAA, additional TCPA restrictions can be unnecessary and counterproductive.

The uncertainty created by the *2015 Omnibus TCPA Order* has chilled communications that provide myriad benefits to patients, such as treatment adherence reminders, coverage and benefits notifications, and appointment confirmations. There is copious empirical evidence in the record that these communications improve health outcomes and expand access to coverage. By granting the Joint Petition, the Bureau can give all HIPAA-regulated entities the legal certainty necessary to give patients the information that they need and expect.

We also emphasized that no good legal or policy reason exists in the record to deny or limit the relief requested in the Joint Petition, and that opposition requests should be denied.

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<sup>4</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1852-56 (2012) (“*2012 TCPA Order*”); FTC Telemarketing Sales Rule, Final Rule Amendments, 16 C.F.R. Part 310, 73 Fed. Reg. 51164, 51192 (Aug. 29, 2008).



*First*, contrary to the claims of certain commenters,<sup>5</sup> the Joint Petition does not propose any change in when prior express consent is required. Under the proposed clarifications, “prior express consent” continues to be required for autodialed or prerecorded non-marketing calls and texts to wireless telephone numbers. And nothing in the Joint Petition would disturb consumers’ right to opt out of any unwanted communications. Moreover, the notion that HIPAA’s robust privacy protections have “no bearing” on the Commission’s TCPA implementation<sup>6</sup> is demonstrably false and inconsistent with numerous decisions from the FCC and the FTC.

*Second*, the Joint Petition does not seek to allow new marketing calls.<sup>7</sup> In fact, it expressly precludes “marketing” calls as they are defined under HIPAA.<sup>8</sup> And HIPAA prohibits covered entities and business associates from using “personal health information” for “marketing” purposes without prior written authorization.<sup>9</sup> Under HIPAA, “marketing” does not include prescription refill reminders, and communications made for certain treatment and healthcare operations purposes, except where the covered entity receives financial remuneration in exchange for making the communication.<sup>10</sup> These are precisely the non-marketing communications for which the Joint Petition seeks clarification. Moreover, the Commission itself confirmed more than five years ago that calls subject to HIPAA “are not unsolicited advertisements” and “are not telephone solicitations.”<sup>11</sup>

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We urge the FCC to act expeditiously on the Joint Petition, especially given the overwhelming support for the Petition in the docket. It is a critical public policy goal to provide effective and efficient medical care, especially to at-risk populations. The aforementioned clarification by the Bureau would lift that unnecessary and unintended burden from this vital industry.

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<sup>5</sup> See *Ex Parte* Letter from National Consumer Law Center, *et al.*, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2-4 (Oct. 18, 2016) (“NCLC Letter”); *Ex Parte* Letter from Consumers Union to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 3 (Oct. 25, 2016) (“Consumers Union Letter”).

<sup>6</sup> NCLC Letter at 3.

<sup>7</sup> *Contra* NCLC Letter at 6-7; Consumers Union Letter at 2-3.

<sup>8</sup> Joint Petition at 4.

<sup>9</sup> *Id.* at 13.

<sup>10</sup> 45 C.F.R. § 164.501.

<sup>11</sup> 2012 TCPA Order ¶ 63 and n. 195.



In accordance with Section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically with your office. Please contact the undersigned with any questions in connection with this filing.

Respectfully submitted,

Mike Merola  
Partner  
Winning Strategies Washington

cc: Zenji Nakazawa